Wan Mohd Afzainizam bin Wan Ahmad & Anor v Tan Sew Yong (suing as lawful widow and dependant of Chin Wai Loy, deceased) & Ors

HIGH COURT (KUALA LUMPUR) — CIVIL APPEAL NO WA-12BNCvC-188–12 OF 2016
NANTHA BALAN J
5 MAY 2017

Civil Procedure — Appeal — Retrial — Respondent brought action against appellants for negligence and nuisance — Sessions court judge initially dismissed claim and then recalled matter and allowed claim on grounds that he had earlier misread his decision — Whether upon setting aside sessions court judge's judgment, in the interest of justice and fairness, re-trial should be ordered before another sessions court judge or whether High Court should examine evidence afresh and decide on merits of claim

The respondents brought an action on behalf of one Chin Wai Loy ('the deceased') against the appellants on the cause of actions of negligence and nuisance arising out of an accident involving the deceased and the appellants. The accident occurred when the car driven by the deceased collided into motorcycle bearing registration No WVC 1757 and motor lorry No WLK 4155, both of which were parked stationary on the road. The rider of the said motorcycle was the first appellant whereas the driver of the motor lorry was one Mohd Shahman bin Mohd Fauzi ('the third party'). In the sessions court, the respondents relied on the evidence of Insp Fuzie bin Samad ('PW1'), the investigating officer for the said accident but the evidence by PW1 did not favour the respondents as he testified that based on his investigations, the deceased was to blame for the accident. PW1 confirmed that there were adequate safety cones and blinker lights placed by the first appellant and the third party to warn the road users that repair work was being carried out on the side of the road. Based on the evidence by the respondents, the appellants had submitted no case to answer. In the present appeal, the main complaint by the appellants was in relation to the complete reversal of the decision by the learned sessions court judge ('the SCJ') who initially dismissed the respondents' claim on 30 November 2016 and then recalled the matter next day (1 December 2016) and allowed the claim on the grounds that he had earlier misread his decision. The issue arose was whether upon setting aside the SCJ's judgment dated 30 November 2016 (the unsafe judgment), in the interest of justice and fairness, a re-trial should be ordered before another sessions court judge or whether the High Court should examine the evidence afresh and decide on the merits of the claim.

Held, setting aside the judgment dated 30 November 2016 and remitting the case to the sessions court for retrial before another judge with costs of RM5,000 subject to 4% allocator:

(1) The court ordered for a new trial grounded on the factors that: (a) there was a concession by counsel for the respondents that the present appeal concerned an 'unsafe judgment' and that there should, as a matter of fairness to both sides, be a new trial; (b) the overall circumstances of the case, including the failure by the SCJ to carefully consider the evidence of PW1 on material respects, particularly PW1's conclusion that the deceased was to be blamed for the accident and the presence of alcohol in the blood and urine of the deceased and the photographs showing extensive damage to the said motorcar which raised clear inference that the said motorcar was speeding before the accident; (c) the lack of clarity from the notes of evidence as to the type of no case to answer that was made and whether the respondents' counsel was put to an 'election' that they would not be calling evidence and would stand or fall by the submissions; and (d) the absence in the defence of any averment or particulars justifying the obstruction on the road and thereby negating negligence or nuisance (see para 66).

[Bahasa Malaysia summary

Responden-responden telah memfailkan satu tindakan bagi pihak Chin Wai Loy ('si mati') terhadap perayu-perayu atas kausa tindakan kecuaian dan gangguan yang timbul akibat daripada kemalangan yang melibatkan si mati dan perayu-perayu. Kemalangan tersebut terjadi apabila sebuah kereta yang dipandu oleh si mati bertembung dengan sebuah motosikal dengan nombor pendaftaran WVC 1757 dan sebuah lori dengan nombor pendaftaran WLK 4155, yang mana kedua-duanya di parkir di jalan raya. Penunggang motosikal tersebut adalah perayu pertama manakala pemandu lori tersebut adalah seorang yang bernama Mohd Shahman bin Mohd Fauzi ('pihak ketiga'). Di mahkamah sesyen, responden-responden bergantung kepada keterangan Insp Fuzie bin Samad ('PW1'), pegawai penyiasat bagi kes kemalangan tersebut tetapi keterangan PW1 tidak berpihak kepada responden-responden kerana PW1 memberi keterangan bahawa berdasarkan penyiasatannya, si mati patut dipersalahkan di atas kemalangan yang berlaku. PW1 mengesahkan bahawa terdapat kon keselamatan dan lampu kilat yang mencukupi yang diletakkan oleh perayu pertama dan pihak ketiga untuk memberi amaran kepada pengguna-pengguna jalan raya bahawa kerja-kerja pembaikan sedang dijalankan di tepi jalan tersebut. Berdasarkan keterangan daripada responden-responden, perayu-perayu menghujahkan tiada kes untuk dijawab. Dalam rayuan semasa, aduan utama oleh perayu-perayu adalah berkaitan dengan penukaran keputusan secara keseluruhan oleh hakim mahkamah sesyen ('HMS') yang pada mulanya menolak tuntutan responden-responden pada 30 November 2016 dan kemudiannya memanggil semula tindakan pada

keesokan harinya (1 Disember 2016) dan membenarkan tuntutan tersebut di atas alasan bahawa beliau telah tersalah membaca keputusannya. Isu yang berbangkit adalah sama ada setelah mengenepikan penghakiman HMS bertarikh 30 November 2016 (penghakiman yang tidak selamat), demi kepentingan keadilan, mahkamah patut memerintahkan perbicaraan semula di hadapan hakim mahkamah sesyen yang lain atau sama ada Mahkamah Tinggi perlu memeriksa semula keterangan dan membuat keputusan berdasarkan merit tuntutan tersebut.

Diputuskan, mengenepikan penghakiman bertarikh 30 November 2016 dan meremit semula kes ke mahkamah sesyen untuk perbicaraan semula di hadapan hakim yang lain dengan kos sebanyak RM5,000 tertakluk kepada 4% allokator:

(1) Mahkamah memerintahkan agar perbicaraan baru dijalankan berdasarkan faktor-faktor bahawa: (a) terdapat konsesi oleh peguam bagi responden-responden bahawa rayuan semasa berkaitan dengan 'penghakiman yang tidak selamat' dan perbicaraan baru adalah perlu demi kepentingan keadilan kedua-dua pihak; (b) keadaan keseluruhan kes, termasuk kegagalan HMS untuk mempertimbangkan secara berhati-hati keterangan PW1 pada aspek material, terutamanya pada konklusi PW1 bahawa si mati harus dipersalahkan di atas kejadian kemalangan tersebut dan kehadiran alkohol di dalam darah dan air kencing si mati dan gambar-gambar yang menunjukkan kerosakan teruk kereta tersebut yang menimbulkan inferens yang nyata bahawa kereta tersebut telah memecut sebelum kemalangan tersebut berlaku; (c) nota keterangan yang kurang jelas berkenaan dengan jenis 'tiada kes untuk dijawab' yang dibuat dan sama ada peguam responden-responden telah diberi pilihan bahawa mereka tidak akan memanggil keterangan dan mereka akan berjaya atau gagal berdasarkan hujah-hujah; dan (d) ketiadaan hujah atau butir-butir oleh pihak pembelaan yang mewajarkan halangan di atas jalan raya tersebut dan seterusnya menafikan kecuaian dan gangguan (lihat perenggan 66).]

Notes

For cases on retrial, see 2(1) *Mallal's Digest* (5th Ed, 2017 Reissue) paras 1919–1921.

Cases referred to

Affin Bank Berhad v WT Low & Ng Realty Sdn Bhd [2003] MLJU 1; [2003] 1 CLJ 674, HC (refd)

Bansal Hermant Govindprasad and Another v Central Bank of India [2003] 2 SLR 33, CA (refd)

Chee Kuan Cheng v Chuo Kong Kah [1967] 2 MLJ 74, FC (refd)

Chia Bak Eng & Anor v Ponggol Bus Service Co [1966] 2 MLJ 224; [1965–1968] SLR 168, FC (refd)
Chua Wah Keow v Ng Ho Huat & Anor [1961] 1 MLJ 321b, CA (refd)
Chua Weng Meng v Wong Kok Kong [1999] 2 MLJ 416, HC (refd)
Dr Bernadine Malini Martin v MPH Magazine Sdn Bhd & Ors and another appeal [2010] 5 MLJ 755, CA (refd)
Gulwant Singh v Abdul Khalik [1963] 1 MLJ 93, CA (refd)
Harrison's Share Under A Settlement Harrison v Harrison and Others; Re Ropner's Settlement Trusts Ropner v Ropner and Others, Re [1955] 1 All ER 185, CA (refd)
Hartecon JV Sdn Bhd & Anor v Hartela Contractors Ltd [1996] 2 MLJ 57, CA (refd)
Jaafar bin Shaari & Anor (suing as Administrators of the Estate of Shofiah bte Ahmad, deceased) v Tan Lip Eng & Anor [1997] 3 MLJ 693; [1997] 4 CLJ 509, SC (refd)
Kho Teng Hooi v The Bristish India General Insurance Co Ltd [1958] 1 MLRH 396 (refd)
Lalchand Nathermal v Kamaluddin bin Maamor [1991] 1 MLJ 380; [1991] 1 CLJ 42, HC (refd)
Lim Yam Teck v Lim Swee Chiang & Anor [1979] 1 MLJ 162 (refd)
Perembun (M) Sdn Bhd v Conlay Construction Sdn Bhd [2012] 4 MLJ 149, CA (folld)
Storey v Storey [1960] 3 All ER 279, CA (refd)
Tomlinson v Commissioner of Taxation (1977) 7 ATR 630 (refd)
XL Petroleum Pty Ltd, Re [1971] VR 560, SC (refd)

Legislation referred to

Courts of Judicature Act 1964 s 33
Road Transport Act 1987 s 117(5)
Rules of Court 2012 O 20 r 11
Subordinate Court Rules 1980

Kamalanathan Ratnam (Vinod Kamalanathan, Ratnavathy Navaratnam, K Vikneswaran and T Archana with him) (Viknes Ratna & Co) for the appellants.
Harpal Singh Grewal (Khairul Aiman bin Kamar Rozaman with him) (G Dorai & Co) for the respondents.

Nantha Balan J:

INTRODUCTION

[1] This is an appeal from the decision of the sessions court. It arises out of a fatal accident claim. The circumstances surrounding the decision in the court below are rather unusual. During this appeal, the decision appealed against has been described as an 'unsafe judgment'. The term 'unsafe judgment' is hardly

used in civil appeals. It is used only in criminal appeals where the accused in the appeal would contend that by reason of the errors or misdirection by the trial judge, the conviction is 'unsafe'.

[2] The main complaint by the appellants is with regard to the complete reversal of the decision by the learned sessions court judge ('the SCJ') who initially 'dismissed' the plaintiffs' claim and then recalled the matter the next day and 'allowed' the claim — on the grounds that he had earlier 'misread' his decision. These are my grounds in respect of an appeal by the appellants (defendants in the court below) against the decision of the sessions court dated 30 November 2016. The critical question is whether upon setting aside the 'unsafe judgment', in the interest of justice and fairness, a retrial should be ordered before another sessions court judge or whether the High Court should examine the evidence afresh and decide on the merits of the claim. I turn now to the SCJ's 'decision' which is being impugned in this appeal.

THE SESSIONS COURT'S DECISION

[3] At the material time when the appeal was lodged on 9 December 2016, the SCJ had not provided his grounds of judgment. Whilst the appeal was on-going before this court, the grounds of judgment were provided. The grounds of judgment are dated 21 April 2017. As stated earlier, the appeal arises out of a fatal accident claim. The plaintiffs in the court below were the lawful dependents of one Chin Wai Loy ('the deceased'), who was driver of motorcar bearing registration No WTN 9827. On 30 November 2016 the plaintiffs' claim was dismissed. The matter was called up again on 1 December 2016 and the plaintiffs' claim against the defendants was 'allowed'. Consequently, judgment for the sum of RM764,000 was entered against the defendants. For convenience, I shall refer to the parties by their original titles, that is, the appellants as 'defendants' and respondents as 'plaintiffs'. The record of appeal shall be referred to as 'AR'. I turn now to the facts of the fatal accident claim.

THE FATAL ACCIDENT

[4] On 13 June 2012, the deceased was driving motorcar No WTN 9827 ('the said motorcar') along Jalan Genting Klang, Kuala Lumpur ('the road') at or around 3am. The deceased was travelling from the direction of Jalan Genting Klang and heading towards the direction of Jalan Pahang, Kuala Lumpur.

[5] The road is 33 ft wide and has three lanes. Each lane is 11 ft wide. The lanes are marked as points A1 to A2, A2 to A3 and A3 to A4 (see police sketch plan at p 97 AR). It is not in dispute that at the material time, the deceased was travelling on the lane nearest to the road divider, that is, the lane marked as A3

to A4 in the sketch plan. At the material time that part of the road (A3 to A4) was blocked off as work was being carried out on the street lamps located on the road divider. There were two vehicles which were parked on the road, namely a motorcycle and a motor lorry. The accident occurred when the said motorcar collided into motorcycle bearing registration No WVC 1757 and motor lorry No WLK 4155, both of which were parked stationary on the road. The rider of the motorcycle and the driver of the motor lorry had parked their respective vehicles on the lane marked as A3 to A4 whilst they carried out certain work on the street-lamps along the divider of the road. Apparently safety cones and blinker lights were placed across that part of the road to warn road users of the block off. The rider of motorcycle No WVC 1757 was Wan Mohd Afzainizam bin Wan Ahmad (first defendant in the court below) and the driver of motor lorry No WLK 4155 was Mohd Shahman bin Mohd Fauzi (first third party in the court below).

[6] As a result of the collision between the said motorcar and the motor lorry and the motorcycle, which resulted in the death of the deceased, the following persons were also injured, namely:

(a) Mohd Shahman bin Mohd Fauzi ('the first third party');

(b) Wan Mohd Afzainizam bin Wan Ahmad ('the first defendant'); and

(c) Mohd Khaidir bin Yusof ('not a party to the proceedings in the court below').

POLICE REPORTS

[7] All three injured persons were apparently at the site of the accident whilst in the course of their employment — carrying out repair work to the street lamps. Each of them lodged police reports and they read as follows:

(a) Mohd Shahman bin Mohd Fauzi (p 293 AR):

> Tarikh: 13/06/2012
>
> ....
>
> Pengadu Menyatakan:-
>
> Pada 13/06/2012 jam lebih kurang 0300 hrs setelah selesai buat kerja-kerja memperbaiki lampu jalan di Jalan Genting Kelang berhampiran dengan balai setapak, saya duduk di atas lori no WLK 4155 yang di letak di lorong kanan yang telah di pasang segala tanda amaran dan kun-kun di belakang lori tersebut.
>
> Tiba-tiba saya lihat sebuah m/kar WTN 9827 yang di pandu dengan laju dari arah belakang telah hilang kawalan lalu melanggar sebuah m/sikal no saya tidak pasti yang dinaiki oleh kawan sekerja saya dan kemudian melanggar kun-kun dan terus melanggar seorang lagi kawan sekerja saya merupakan

pemandu m/lori WLK 4155 yang sedang berdiri di belakang lorinya dan kemudian kereta tersebut terus merempuh belakang tersebut akibat dari rempuhan yang kuat saya telah tercampak dan jatuh dari atas lori. Saya telah mengalami cedera ringan di tangan kiri dan kedua dua rakan sekerja saya telah mengalami kecederaan parah dan kini mendapat rawatan di hospital kuala lumpur.

(b) Mohd Khaidir bin Yusof (p 295 AR):

Tarikh: 03/07/2012

...

Pengadu Menyatakan:

Pada 13/06/2012 jam l/kurang 0300 hrs saya sedang menyusun kun kun di belakang m/lori WLK 4155 di tepi Jalan Genting Klang untuk kerja-kerja pembaikan lampu. tiba tiba tanpa sebarang amaran atau isyarat sebuah m/kar no WTN 9827 yang di pandu dengan laju dari arah belakang telah hilang kawalan lalu melanggar saya. Akibat daripada kemalangan ini saya mengalami kecederaan parah di kaki dan tangan telah mendapat rawatan di Hospital Prince Court. Sekian laporan saya.

(c) Wan Mohd Afzainizam bin Wan Ahmad (p 296 AR):

Tarikh: 02/08/2012

...

Pengadu Menyatakan:

Pada 13/06/2012 jam lebih kurang 0300 hrs saya sedang berdiri di tepi m/sikal saya no WVC 1757 di belakang kun-kun untuk kerja-kerja pembaikan lampu jalan di tepi Jalan Genting Klang apabila sebuah motokar no pendaftaran WTN 9827 yang dipandu laju telah terbabas dan melanggar saya dari arah belakang.

Akibat kemalangan saya mengalami kecederaan parah hampir seluruh badan dan mendapatkan rawatan di Hospital Kuala Lumpur. Kerosakan m/sikal saya adalah di bahagian belakang dan lain kerosakan yang belum pasti. Sekian report saya.

THE PLAINTIFFS' PLEADED CASE

[8] The plaintiffs sued the rider and owner of motorcycle No WVC 1757 (the first defendant and second defendant respectively) and they in turn brought in the driver and owner of motor lorry No WLK 4155 as third parties (the first third party and second third party respectively). The plaintiffs' case was that it was because of the obstruction caused by motorcycle No WVC 1757 which was parked stationary on the road that caused the said motorcar to crash into motorcycle No WVC 1757 and thereafter into motor lorry No WLK 4155 which was also parked stationary on the road. The plaintiffs' claim against the

defendants was predicated on a cause of action for negligence (with particulars of negligence pleaded thereunder) and these are to be found in paras 5–6 of the statement of claim, which read as follows:

> 5. Pada 13hb Jun 2012, Chin Wai Loy, simati secara sah sedang memandu motokar WTN 9827 dari arah Jalan Genting Klang menuju ke arah Jalan Pahang dan apabila sampai di Jalan Genting Klang, Kuala Lumpur, Wilayah Persekutuan, beliau terpaksa melanggar motosikal WVC 1757 yang diletakkan di jalan tersebut oleh Defendan Pertama tanpa sebarang amaran atau isyarat yang telah menyebabkan simati hilang kawalan dan terpaksa melanggar sebuah lagi kenderaan (motolori WLK 4155) di jalan tersebut dan akibat kemalangan ini simati telah meninggal dunia.
>
> 6. Kemalangan tersebut diakibatkan semata-mata atau disumbangkan oleh kecuaian Defendan Pertama sebagai ejen atau orang gaji atau orang yang menunggang dengan keizinan Defendan Kedua dalam pengawalan penguasaan dan pembawaan motosikal WVC 1757. (p 225, AR)
>
> Particulars of negligence
>
> (a) Gagal untuk mempunyai sebarang atau apa-apa sikap hati-hati dan/atau untuk mempunyai sebarang atau apa-apa pertimbangan yang sewajarnya terhadap pengguna-pengguna, kenderaan-kenderaan jalanraya yang lain terutamanya simati dan/atau motokarnya;
>
> (b) Gagal langsung atau gagal dalam masa yang mencukupi untuk menyedari kehadiran simati dan/atau motokar bagi mengelakkan perlanggaran tersebut;
>
> (c) Gagal menggunakan kebijaksanaan dan kemahiran yang munasabah di dalam pengawalan motosikal tersebut;
>
> (d) Meletakkan motosikal di tempat yang gelap dan terselindung;
>
> (e) Gagal memberikan simati hak laluannya;
>
> (f) Gagal memberikan sebarang tanda atau amaran yang mencukupi semasa memberhentikan motosikal di laluan kenderaan lain;
>
> (g) Meletakkan motosikal tersebut di laluan simati;
>
> (h) Meletakkan motosikal tersebut di tempat jalan yang salah;
>
> (i) Mengakibatkan simati hilang kawalan lalu melanggar motolori;
>
> (j) Gagal meletakkan sebarang tanda amaran di belakang motosikal tersebut yang menunjukkan bahawa motosikal di parker di situ;
>
> (k) Gagal meletakkan apa-apa isyarat atau kon-kon keselamatan di belakang motosikal tersebut;
>
> (l) Mewujudkan satu halangan tidak sah di jalan tersebut;

[9] The plaintiffs also pleaded a cause of action in nuisance in para 8 of the statement of claim and it reads as follows:

A 8. Plaintif-Plaintif juga menyatakan bahawa Defendan-Defendan telah mewujudkan satu kacau gangguan (nuisance) di jalan atau lebuhraya tersebut; (p 227, AR)

DEFENCE

B

[10] In the defence, it was pleaded that motorcycle No WVC 1757 was 'not involved in the accident' (para 2 at p 229 AR). It was pleaded alternatively that if motorcycle No WVC 1757 was involved, then the accident was caused by the negligence of the deceased (para 3 at p 229 AR). The particulars of negligence C that were pleaded against the deceased are what running-down practitioners would describe as the 'standard' particulars of negligence. There was nothing in the particulars of negligence to state that motorcycle No WVC 1757 was lawfully parked on that part of the road (between point A3 to A4) whilst the first defendant was carrying out repair work to the street lamps. There was also D no specific averment in the defence to state that blinker lights and safety cones had been placed across that part of the road to warn road users of the obstruction.

E **[11]** The closest that the defendants came to alluding to any warning is para (g) under particulars of negligence where it was stated:

gagal memberi penumpuan dan/atau sebarang penumpuan kepada tanda amaran dan/atau sebarang tanda amaran dan/atau sebarang isyarat yang diberikan oleh pihak defendan akan kehadirannya di jalan raya.

F

[12] But this only states that the deceased did not heed the warnings given by the defendants of their presence on the road. Interestingly, the defendants had pleaded in para 4 of the defence (p 232 AR) that the accident was caused by motor lorry No WLK 4155, where it was pleaded under particulars of G negligence against the driver of the motor lorry that the motor lorry was wrongfully parked on the road and caused obstruction to the said motorcar. This is seen from para (b), (j), (k) and (q) (pp 233–234 AR) which read as follows:

(b) Memparkir motorlori di tempat yang tidak sepatutnya;

H ...

(j) Meletakkan pemandu motokar khususnya WTN 9827 dalam keadaan kecemasan dan tidak memberi sebarang kesempatan bagi motokar WTN 9827 mengelak perlanggaran tersebut;

I (k) Gagal memberikan motokar WTN 9827 hak laluan jalanraya yang sah;

...

(q) Gagal memasang signal/tanda amaran bagi memastikan kenderaan lain terutamanya WTN 9827 menyedari akan kehadirannya di atas jalan pada ketika itu.

THE TRIAL

[13] At the trial, for purposes of establishing liability, the plaintiffs relied solely on the evidence of Insp Fuzie bin Samad ('PW1') who was the investigating officer for this incident. No other witnesses were called in relation to the issue of liability. However, PW1's evidence did not favour the plaintiffs as he testified that based on his investigations, the deceased was to blame for the accident. PW1 confirmed that there were adequate safety cones and blinker lights to warn road users that repair work was being carried out on the side of the road.

[14] I turn now to the 'condition' of the deceased. In so far as the condition of the deceased was concerned, a post-mortem was conducted and it revealed that there was undigested food in the stomach of the deceased and a toxicology report showed that there was alcohol in the blood and urine of the deceased, although the alcohol level was not above the legal limit.

[15] At the end of the plaintiffs' case, the defendants submitted no case to answer. But rather unfortunately, I was unable to discern from the notes of evidence the exact deliberation between counsel and the SCJ with respect to the defendant's stand on 'submission of no case to answer' as the notes merely state at p 219 AR — 'DC — Dengan itu saya menutup case. (inaudible conversations)'.

[16] But in the written submissions counsel for the defendant did allude to the fact that the defendant was submitting no case to answer. Principally, the defendant took the position that based on PW1's evidence, there was no prima facie case of negligence or nuisance. The defendants also took the position during submission in the court below that there was no case to answer, inter alia, based on the unmistakable verbal articulation by the SCJ where he said during cross-examination of PW1 at p 51 AR that:

> Judge — (inaudible) Saya rasa selepas mendengar IO, saya boleh membuat keputusan. Make it short. I give you another 3 minutes.

[17] Thus, counsel for the defendants assumed (not unreasonably) that the SCJ was giving a 'hint' or 'heads-up' as to what was going on in his mind and that the clear indication from the bench was that he was going to dismiss the claim and that counsel for the defendants should not belabour the cross-examination any further.

EVENTS ON 30 NOVEMBER 2016 AND 1 DECEMBER 2016

[18] The trial concluded on 7 October 2016, after the plaintiffs had called seven witnesses. It must be emphasised that PW1 was the sole witness on

liability. The case was then reserved for decision on 30 November 2016. This now brings me to the problematic aspect of the SCJ's decision.

[19] The events that transpired on 30 November 2016 and 1 December 2016 are as stated in an affidavit affirmed by counsel for the defendant, Ms Ratnavathy a/p Navaratnam. Her affidavit was affirmed on 10 February 2017 ('Ratnavathy's affidavit'). She conducted the trial. Ratnavathy's affidavit was filed for purposes of a 'civil revision' application under s 33 of the Courts of Judicature Act 1964 which was registered in Court NCvC 9 as Kuala Lumpur High Court Application For Civil Revision No WA-13NCVC-1–12 of 2016. I should point out that neither the plaintiffs nor the plaintiffs' solicitors filed any affidavit(s) in the civil revision proceedings to challenge the contents of Ratnavathy's affidavit. Apart from Ratnavathy's affidavit, there were also affidavits which were filed by counsel, Ms Archana Devi and Mr Vikneswaran a/l Kanapathipillai both affirmed on 13 February 2017, confirming the contents of Ratnavathy's affidavit. Hence, in order to ensure that there was no dispute as to the narrative of events, I asked counsel for the plaintiffs who appeared before me in this appeal whether they were able to confirm the correctness of the contents of Ratnavathy's affidavit. Junior counsel for the plaintiffs, Encik Khairul Aiman bin Kamar Rozaman ('Encik Khairul') informed me that he had checked with counsel, Mr Sooriabalan who handled the trial. Mr Sooriabalan was not present before the SCJ on 30 November 2016 but he was present on 1 December 2016.

[20] Encik Khairul informed the court that Mr Sooriabalan had confirmed that all the factual averments in Ratnavathy's affidavit are true and accurate. With this confirmation, I turn now to Ratnavathy's affidavit. It is in Bahasa Malaysia and the relevant paragraphs in relation to the SCJ's decision, read as follows:

> 3. Pada 30 haribulan November 2016, Kes No A53KJ-277–04 Tahun 2015 yang dibicarakan di hadapan Tuan Nu'aman B Mahmud Zuhudi, Hakim di Mahkamah Sivil 4 Kuala Lumpur ditetapkan untuk keputusan.
>
> 4. Saya telah hadir pada hari tersebut pada jam 9.00 pagi di Mahkamah untuk keputusan kes dan pihak plaintif diwakili oleh Cik Dhayalini dari Tetuan G Dorai & Co dan pada lebih kurang pukul 10.00 pagi, pihak-pihak telah dijemput masuk ke kamar Hakim oleh jurubahasa Mahkamah.
>
> 5. Selanjutnya, selepas pihak-pihak yang dimaksudkan di atas telah mengambil tempat dalam Kamar, Tuan Hakim Nu'aman B Mahmud Zuhudi, *Tuan Hakim mula membaca keputusannya dengan menyatakan 'pihak plaintif bertanggung 100% liabiliti* dan selanjutnya membaca awad-awad untuk kuantum.
>
> 6. Semasa Tuan Hakim membaca butiran awad bagi kuantum, *saya memohon klarifikasi dan tanya Tuan (Adakah kes plaintif ditolak dengan kos) dan Tuan Hakim mengulangi sekali lagi plaintif bertanggung 100% liabiliti*.
>
> 7. Selanjutnya, Tuan Hakim telah menyatakan tentang awad kos dan sekali lagi *saya*

telah memohon klarifikasi bahawa kos adalah kepada defendan dan Tuan Hakim telah mengangguk kepala dan menyatakan ya.

8. Setelah pulang ke pejabat saya telah memohon rakan kongsi saya, Puan Archana Devi menelefon Tetuan G Dorai & Co dan mendapatkan butir-butir tentang kuantum dan Puan Archana Devi telah berbual dengan Cik Dayalini daripada *Tetuan G Dorai & Co yang juga mengesahkan bahawa tuntutan plaintif telah ditolak*, tetapi butiran kuantum yang diambil oleh beliau tidak lengkap dan peguam tersebut telah memaklumkan Puan Archana Devi bahawa beliau akan meminta daripada jurubahasa mahkamah.

9. Pada tarikh yang sama lebih kurang pukul 3.00 petang, *jurubahasa mahkamah telah mengesahkan keputusan bahawa liabiliti adalah 100% terhadap plaintif kepada Puan Archana Devi* dan ianya telah dicatit oleh Puan Archana Devi.

10. Walaupun demikian, pada lebih kurang pukul 7.00 malam saya telah mendapat panggilan daripada Puan Archana Devi di mana beliau memberitahu saya bahawa dia telah mendapat satu mesej daripada jurubahasa India, Cik Lawania a/p Selorage iaitu daripada Mahkamah Tuan Nu'aman menyatakan bahawa Tuan Hakim hendak jumpa pihak-pihak pada pagi 1 haribulan Disember 2016 kerana ada perubahan atas keputusan.

Salinan 'Whatspp' yang dihantar pada 30 November 2016 dilampirkan di sini dan ditandakan sebagai eksh 'RN1'.

11. Pada keesokan hari, tarikh 1 haribulan Disember 2016, pihak kami diwakili oleh kesemua rakan kongsi firma terdiri daripada saya, Encik Viknesvaran dan Puan Archana Devi hadir di Mahkamah sepertimana yang dinyatakan. Pihak plaintif diwakili oleh En Sooriabalan dan semua pihak dijemput sekali lagi ke kamar pada lebih kurang pukul 10.00 pagi.

12. Di dalam kamar, Yang Arif Tuan Hakim telah menyatakan bahawa beliau telah terkhilaf apabila memberi keputusan semalam iaitu pada 30 haribulan November 2016 dan hanya menyedari kesilapan tersebut pada 5.30 petang pada hari yang sama keputusan dibacakan tetapi oleh kerana beliau telah 'functus officio', beliau akan mengekalkan keputusan pada 30 haribulan November 2016 tersebut dan akan merujuk kepada Seksyen 33, Akta Judicature 1964 bagi tujuan 'revision' dan seterusnya menyuruh mana-mana pihak yang hendak merayu boleh merayu.

13. *Saya telah tanya Tuan Hakim 'so the decision as delivered yesterday stands?' dan beliau menjawab 'yes'.*

14. Pihak kami kemudiannya memfailkan deraf penghakiman sepertimana yang dinyatakan oleh Tuan Hakim iaitu 'plaintif tanggung liabiliti 100% pada 6 Disember 2016. Tetapi pada 6 Disember 2016, kami telah mendapat kembali deraf yang tidak diluluskan dengan minit yang menyatakan 'Defendan bertanggung 100%'.

Sesalinan deraf penghakiman bertarikh 30 November 2016 yang dipinda oleh mahkamah dilampirkan di sini dan ditandakan sebagai eksh 'RN-2'.

15. Dengan itu, pada 9 Disember 2016, pihak kami terus memfailkan notis rayuan atas isu liabiliti dan kuantum yang kini ditetapkan untuk pengurusan Kes pada 20 Februari 2017.

Sesalinan notis rayuan termeterai bertarikh 9 Disember 2016 dilampirkan di sini dan ditandakan sebagai eksh 'RN3'.

16. Pada 7 Februari 2017, rakan kongsi saya bernama Puan Archana Devi telah membuat carian fail bagi tindakan Mahkamah Sesyen Kuala Lumpur No A53KJ-277–04 Tahun 2015 bagi tarikh 30 November 2016 dan 1 Disember 2016, tetapi *minit mahkamah dalam sistem menunjukkan bahawa keputusan yang diberikan pada 30 November 2016 adalah defendan bertanggungan 100% dan tiada sebarang minit untuk tarikh 1 Disember 2016*.

Sesalinan permohonan semakan fail, resit bayaran dan minit mahkamah pada 30 November 2016 dilampirkan di sini dan ditandakan sebagai eksh 'RN'4'. (Emphasis added.)

[21] I turn now to the exchange of the WhatsApp messages on 30 November 2016 at 19.04 hours between the court staff, Ms Lawania and counsel for the defendant, Ms Archana Devi (see para 10 of Ratnavathy's affidavit). They read as follows:

Interpreter	Hi Ms Archana Lawania here The decision gt some amendment
Counsel	halo my dear alamak
Interpreter	Can you come to clarify with Tuan tomorrow Hahah
Counsel	seriously?
Interpreter	Yes
Counsel	on liability or quantum?
Interpreter	Only in the liability part I think
Counsel	bt tuan delivered already wht
Interpreter	Yeah But Tuan ask to come tomorrow

[22] Hence, as a result of the events that transpired on 1 December 2016, there was a reversal by the SCJ and the outcome now went completely against the defendants. It swung from 100% liability against the deceased (30 November 2016) to 100% liability against the defendants (1 December 2016). The defendants filed a notice of appeal on 9 December 2016. At the material time, the SCJ had not furnished his grounds of judgment. The defendants made a number of trenchant complaints in their memorandum of appeal as regards the SCJ's decision.

[23] The relevant parts of the memorandum of appeal read as follows:

1. Hakim Mahkamah Sesyen telah terkhilaf dari segi fakta dan undang-undang apabila pada 30 haribulan November 2016 memberi keputusan bahawa Responden/Plaintif bertanggungan liabiliti sebanyak 100% dan selanjutnya telah mengesahkannya buat kali kedua apabila peguamcara Perayu/Defendan bertanyakan semula dan selanjutnya juga mengesahkan buat kali ketiga apabila memberitahu peguamcara Perayu/Defendan bahawa kos kepada Perayu/Defendan tetapi kemudiannya apabila deraf penghakiman bertarikh 30 haribulan November 2016, dikembalikan oleh Mahkamah, liabiliti dicatit sebagai 100% terhadap defendan-defendan dan bukannya plaintif.

2. Hakim Mahkamah Sesyen telah terkhilaf dari segi fakta dan undang-undang apabila gagal mengambil tahu bahawa peguamcara Perayu/Defendan-defendan juga telah membuat panggilan telefon ke Mahkamah pada 3.00 petang pada 30 haribulan November 2016 dan bercakap dengan jurubahasa Mahkamah di mana butir-butir terperinci atas liabiliti dan kuantum telah dibacakan dan sekali lagi keputusan yang dibacakan adalah sama seperti keputusan yang dibacakan oleh Tuan Hakim pada pagi hari yang sama.

3. Hakim Mahkamah Sesyen telah terkhilaf dari segi fakta dan undang-undang apabila mengarahkan jurubahasa Mahkamahnya untuk memanggil telefon bimbit peribadi peguamcara Perayu/Defendan yang mengendalikan kes pada 30 haribulan November 2016, pada pukul 6.54 petang iaitu selepas waktu kerja untuk memaklumkan secara lisan serta pesanan ringkas bahawa Tuan Hakim hendak pihak-pihak menemunya semula di Mahkamah pada hari keesokan iaitu pada 1 haribulan Disember 2016 kerana terdapat pindaan dalam keputusan Tuan Hakim atas isu liabiliti yang telah diberikan olehnya pada 30 haribulan November 2016.

4. Hakim Mahkamah Sesyen telah terkhilaf dari segi fakta dan undang-undang apabila telah mengatakan pada 1 haribulan Disember 2016 bahawa beliau telah terkhilaf apabila memberi keputusan semalam iaitu pada 30 haribulan November 2016 dan hanya menyedari kesilapan tersebut pada 5.30 petang hari yang sama keputusan dibacakan, tetapi oleh kerana beliau telah 'functus officio' beliau akan mengekalkan keputusan pada 30 haribulan November 2016 tersebut dan akan merujuk kepada Seksyen 33 Akta Judicature 1964 bagi tujuan 'revision' dan seterusnya menyuruh mana-mana pihak yang hendak merayu boleh merayu.

5. Hakim Mahkamah Sesyen telah terkhilaf dari segi fakta dan undang-undang apabila setelah keputusan muktamad yang diberikan pada waktu pagi pada 30 haribulan November 2016, tiba-tiba mendapat ilham pada petang hari yang sama tanpa sebarang permohonan melalui surat rasmi kepada Mahkamah oleh mana-mana pihak memerlukan sebarang klarifikasi atau keputusan.

6. Hakim Mahkamah Sesyen telah terkhilaf dari segi fakta dan undang-undang apabila menukar keputusan atas liabiliti selepas keputusan muktamad diberikan pada 30 haribulan November 2016 yang

selanjutnya telah disahkan olehnya sendiri sebanyak 3 kali dan disahkan semula oleh jurubahasa pada 3 petang pada 30 haribulan November, 2016 hari yang sama dan kemudiannya disahkan semula pada 1 haribulan Disember 2016 bahawa keputusan pada 30 haribulan November 2016 akan dikekalkan.

[24] As it turned out, the civil revision application did not gain any traction and was dismissed as the learned judge of the High Court (NCVC9) had opined (correctly in my view) that since the defendants had mounted an appeal, it is only proper that the matter be handled via the process of civil appeal to the High Court rather than civil revision.

[25] In the midst of all this, the defendants' solicitors conducted a file search and discovered that the minutes of the sessions court for 30 November 2016 was at variance with what had actually transpired before the SCJ as it now reads as, inter alia, 'liability — defendant 100%' (p 49 AR Vol 3). Significantly, there was nothing in the minutes of the sessions court on the events or even the gist of the matters that were narrated in Ratnavathy's affidavit. It is against the above-mentioned backdrop of events that this appeal was filed. I turn now to the topic of 'unsafe judgment'.

UNSAFE JUDGMENT

[26] Before me, leading counsel for the plaintiffs, Dato' Harpal Singh Grewal took the path of least resistance and did not seek to condone or defend the unusual events that took place before the SCJ as described above. He very properly conceded that the SCJ was not entitled to change his mind in this fashion and candidly described the judgment of the SCJ as an 'unsafe judgment'. Counsel for the plaintiffs submitted that in view of what had happened in the court below, as a matter of fairness and justice to all parties, the judgment should be set aside and the case remitted to the sessions court for retrial before another sessions court judge.

[27] However, Dato' Ratnam Kamalanathan, learned counsel for the defendants took the view that there should be no rehearing as that would afford the plaintiffs a 'second bite at the cherry' and submitted that despite the unusual and unsatisfactory events that took place on 30 November 2016 and 1 December 2016, this court should, in the exercise of its appellate jurisdiction, rehear the evidence so that the matter is brought to an end. Counsel for the defendants urged upon this court to review the evidence and dismiss the plaintiffs' claim instead of sending the case back to the sessions court for trial, which he contended, would be a waste of judicial time and resources. Counsel said that a retrial will achieve nothing as there was nothing more that can be elicited in terms of liability and that the plaintiffs had put their best case

forward. According to counsel for the defendants, on the available evidence, the plaintiffs' claim should be dismissed. At this juncture, it may be recalled that at the trial the defendants had submitted no case to answer and did not lead any evidence in relation to the incident that took place at the site of the accident on 13 June 2012. It was submitted that there was no evidence to suggest any liability against the defendants. Also, the defendants relied on the fact that the plaintiffs' only witness, PW1, testified that the defendants were lawfully carrying out work at the site and that there were safety cones and blinker lights at the site to warn road users of the obstruction.

[28] I was also reminded that PW1 had formed the opinion, after conducting his investigations, that the deceased was to blame for the accident. As I said, PW1 was the sole witness on liability. The relevant part of his evidence was as follows:

DC

Boleh beritahu Setapak report 7681/12 daripada siapa?

PW1

Butir-butir pengadu untuk Setapak report 7681/12 adalah daripada Mohamad Khairulnizam bin Maarof, salah seorang pekerja teknik DBKL, Tuan.

DC

Siapa beliau? Boleh bagi sesalinan report tersebut? Sekiranya dibenarkan.

PW1

Di dalam IP, Tuan. Pengadu mengatakan laporan ini ditaip semula sepertimana ditulis pengadu dalam kertas putih. Saya sebagai penyelia teknikal kawasan Wangsa Maju ingin melaporkan kejadian kemalangan yang melibatkan kontraktor elektrik yang dilantik oleh DBKL bagi kerja-kerja penyelenggaraan lampu jalan di sekitar Kuala Lumpur. Pada tarikh 13.6.2012, jam 3 pagi, dikhuatiri seorang pemandu kenderaan jenis Proton Pesona nombor pendaftaran WTN 9827 telah hilang kawalan dan melanggar kon-kon keselamatan yang telah diletak di sepanjang jalan di Jalan Pahang berhampiran balai polis Setapak.

Seterusnya melanggar dua orang pekerja kontraktor elektrik yang telah selesai menjalankan kerja-kerja penyelenggaraan tiang lampu di jalan tersebut.

Kejadian itu berlaku ketika saya dalam perjalanan pulang ke rumah selepas menyelia kerja-kerja di tempat tersebut. Tujuan saya buat laporan adalah untuk rujukan pihak DBKL sekiranya masalah ini berbangkit di kemudian hari. Sekian laporan.

...

DC

Mengikut gambar yang diambil oleh Insp sepertimana di mukasurat 8 dan 12, gambar-gambar berwarna ini menunjukkan tempat kejadian terang, betul? Kalau gelap, kedudukan kenderaan tidak boleh dilihat. Kalau lihat gambar-gambar ini, kenderaan-kenderaan ini boleh dilihat dengan terang. Boleh nampak plate number lagi. Setuju tempat kejadian agak terang?

Judge

Berlampu ya?

PW1

Jalan berlampu, Tuan.

Judge

Menyala, ya?

PW1

Menyala, Tuan.

...

DC

Insp boleh sahkan pada hari tersebut, pekerja-pekerja iaitu Wan Mohd Afzainizam, Mohamad Haidir Yusuf dan Shamad, pihak-pihak yang membuat laporan polis dalam kejadian ini yang membaiki lampu berada di atas jalan secara sah untuk membaiki lampu jalan pada hari itu. Setuju?

PW1

Ya, benar.

...

DC

Ya, setakat siasatan yang Insp lakukan, *Insp boleh sahkan bahawa sememangnya terdapat langkah-langkah keselamatan iaitu kon-kon yang diletakkan di tengah jalan bila kerja-kerja pembaikan lampu dijalankan pada ketika itu*?

PW1

Berdasarkan keterangan saksi, ya, Tuan.

DC

Mengikut gambarajah kasar yang disedikan oleh Insp, *kemalangan berlaku di lorong paling laju iaitu, A3 hingga A4, betul*?

PW1

Ya, benar.

DC

Dan di tempat kejadian ini mempunyai 3 lane, betul?

PW1

Ya, benar.

DC

Mengikut siasatan Insp, *pada waktu kejadian lorong paling laju iaitu A3 dan A4 adalah ditutup untuk menjalankan kerja-kerja pembaikan lampu, betul?*

PW1

Ya, benar.

...

Judge

(inaudible) *Saya rasa selepas mendengar IO, saya boleh membuat keputusan. Make it short. I give you another 3 minutes*.

...

DC

Saya katakan kepada Insp, kamu boleh setuju ataupun tidak, *kemalangan ini berlaku kerana kecuaian pada motorkar si mati. Sebab itu tiada saman yang dikeluarkan kepada kes ini. Sebab beliau telah meninggal. So tak ada guna serahkan saman kepada dia. Kecuaian sebenarnya ada pada motorkar si mati itu. Betul*?

PW1

Setuju. (Emphasis added.)

[29] Quite obviously the SCJ had, despite giving a hint during the trial that the plaintiffs had not proven their case on liability, later 'changed his mind'. From the contents of Ratnavathy's affidavit, it would appear that at all material times, until the WhatsApp messages were sent by his interpreter, Ms Lawania, on the evening of 30 November 2016, the SCJ was minded to dismiss the plaintiffs' claim, which is consistent with his statement during cross-examination of PW1 where he said:

Saya rasa selepas mendengar IO, saya boleh membuat keputusan. Make it short. I give you another 3 minutes.

[30] Thus, the question is whether a trial judge may change his mind and make a complete reversal of his earlier decision. This therefore takes us to the topic of power of the court to alter, vary or amend the judgment/order.

ALTERING, VARYING OR AMENDING A JUDGMENT

[31] One of the authorities that was cited for the proposition that a judge could alter, vary or amend his decision, after delivery of the decision, was the case of *Chua Weng Meng v Wong Kok Kong* [1999] 2 MLJ 416, where the learned judge, Zulkefli bin Ahmad Makinuddin (as he then was — now President of the Court of Appeal) said at p 422:

In the case of *Seong Fatt Sawmills Sdn Bhd v Dunlop Malaysia Industries Sdn Bhd* [1984] 1 MLJ 286 His Lordship Abdul Hamid FJ (as he then was) in delivering the judgment of the Federal Court, inter alia, stated that where it is necessary and justice of the case requires it, the court should be at liberty to reopen the case and this is particularly so, where there has only been a provisional order and this is done to perfect an order.

Having analysed the above cited cases, a clearer picture is formed on the governing principles as to when and in what circumstances the court may alter, vary or amend a judgment or an order pronounced though not perfected. Such governing principles in my view can be outlined as follows:

A (1) The application to recall the judgment or order for the purpose of reviewing it must be done expeditiously.

(2) Having regard to the extensive rights of appeal, the power to recall an order which has not been passed and entered should be sparingly exercised if such issues for further consideration can be left to be dealt with by way of appeal to the Court of Appeal.

B

(3) There must be an intervening act or event from the day the order was pronounced to the day when the order was recalled for review and that an unperfected order is recalled when there is some doubt regarding the correctness of the order as orally pronounced.

C

(4) Where it is necessary and the justice of the case requires it to be reviewed and when a judge reopened the case with a view to perfecting the order.

D **[32]** In that case, the successful party applied to the court several months after the decision had been delivered and sought for a variation of the order as regard to costs. The peculiar fact there was that the plaintiff was awarded scale costs but the judgment sum was RM207,742 and scale costs at that time according to the Subordinate Court Rules 1980, was pegged at a maximum judgment sum of RM100,000. Hence, the learned judge altered that part of the order and replaced scale costs with discretionary costs which was to be taxed. It is interesting to note that the learned judge in the above-mentioned case had referred to the Singapore decision of *Lim Yam Teck v Lim Swee Chiang & Anor* [1979] 1 MLJ 162 (HC). In that case, the trial judge, Mr Justice Kulasekaram had initially dismissed the plaintiff's claim in a running down action. But he was not happy with his decision. He had doubts about the correctness of his decision. He then asked parties to come back and declared that although he had earlier dismissed the claim, the case was still to be treated as 'on-going' and he invited parties to submit further on the parts of evidence that were troubling him. Ultimately he came to the opposite conclusion and allowed the plaintiff's claim. He gave his reasons for changing his decision. The defendants' appeal to the Court of Appeal was dismissed.

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H **[33]** The relevant passages from the judgment of the High Court read as follows (at p 163):

> At the end of the hearing I dismissed the plaintiff's action with costs. In so doing I took the view that as the only damage to the pickup was on the rear just above the nearside tail light, this indisputable fact, could not possibly fit in with the plaintiff's version of the accident and therefore preferred the defendant's version of the accident. However when I heard the plaintiff and the defendant give evidence before me I formed the opinion that plaintiff was a truthful witness and gave a true account of the accident and not the defendant.
>
> After I had dismissed this action and arisen from court as I was not too happy with the end result I gave the matter further consideration and I then took the view that

I

I may not be justified in having come to the conclusion that plaintiff's version could not be reconciled with the indisputable damage found on the defendant's motor pickup.

That same afternoon I directed my personal assistant to inform both counsel not to treat the matter as concluded and final as I would like to hear further submissions from them.

Consequent on this direction both counsel appeared before me on a later date when I explained the circumstances to them and invited further submissions on the matter from them.

Mr Wu on behalf of the defendants made a thorough and comprehensive submission and urged every point that could be put forward on behalf of the defendants why my earlier decision was the correct one and that it should not be interfered with.

I took the view that my earlier decision should be varied as the plaintiff's version is not altogether inconsistent and irreconcilable with the damage found on the motor pickup. I took the view that the plaintiff had given a true account as best as he could of what happened in connection with this accident. I considered the defendant to be an untruthful witness.

[34] In so far as the Singapore case of *Lim Yam Teck v Lim Swee Chiang & Anor* [1979] 1 MLJ 162 (HC) is concerned, my view is that once the trial judge had given his decision, then he becomes 'functus officio'. In strict legal theory, the trial judge cannot 'undo' or 'unravel' his decision and make a complete reversal and then decide the other way. There is nothing in the reported judgment to indicate that the issue of 'functus officio' was even raised before the trial judge when he recalled the parties. Also, I cannot say that the Singapore Court of Appeal had dealt with the issue of recall or reversal of the earlier decision or functus officio as there are no written grounds of judgment by the Court of Appeal.

[35] The basic and general rule is that once a decision has been made it is final and cannot be reopened or reversed as the court is functus officio. It can only be reversed on appeal (see *Hartecon JV Sdn Bhd & Anor v Hartela Contractors Ltd* [1996] 2 MLJ 57 (CA)). As such, it is axiomatic and imperative for judicial decision makers to be clear and resolute at all times in their decisions. They should not be unsure of the correctness of their decisions and most certainly, after making a decision, they should not change or reverse their decision. When they pronounce their decision, they should know the reasons why they have reached their particular conclusion or finding. If they have doubts, then they should not pronounce their decision and should instead, seek clarification, if necessary.

[36] In the case of a genuine 'misreading' of the actual decision, the situation can be remedied by quickly recalling the parties and remedying the mistake.

A The other type of mistake is the more problematic situation where a judge makes a decision and declares it to the parties and then entertains some residual doubt about the correctness of his decision. The question is whether he can then decide to reverse his decision. In my view, in certain circumstances, it may be valid and acceptable for the decision maker to recall parties and resurrect the B proceedings and ask for further clarification and rectify the mistake or 'misreading' of the initial decision but subject to the rider that this has to be done promptly and at any rate, before it is too late in the day particularly if the order is sealed and acted upon. I should add that any amendment after the order is sealed can only be done via the 'slip rule' provision of O 20 r 11 of the C Rules of Court 2012. But that does not arise in the present case. It is obvious enough that any amendment or alteration of a judgment after it has been declared to the parties is bound to cause concern to the party which now finds itself driven from the seat of a successful outcome. The power to amend or alter is a narrow one and must be used sparingly. It is a power which allows for D alterations, amendments and variations where there are extenuating or change in circumstances which call for the use of the power but it can hardly be a power to allow for a complete reversal of a decision due to a judicial epiphany as this will be chaotic to the judicial system besides being inherently insidious to the integrity of the judicial process.

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[37] The jurisprudence on this aspect of adjectival law is quite well settled and the relevant guiding principles and parameters for this very limited and sparing power to alter or amend a judgment or decision may be gleaned from the following cases which were referred to in *Chua Weng Meng v Wong Kok* F *Kong* [1999] 2 MLJ 416:

(a) in the case of *Chee Kuan Cheng v Chuo Kong Kah* [1967] 2 MLJ 74, Ong Hock Thye FJ at p 75 stated as follows:

> Moreover, the order had not been drawn up and entered. Until an order is G perfected the court's jurisdiction to review the subject matter and to recall an order pronounced is undoubtedly a matter of wide discretion.

(b) in the case of *Chua Wah Keow v Ng Ho Huat & Anor* [1961] 1 MLJ 321b (CA) at p 322, Tan Ah Tah J had this to say:

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> ... But a perusal of the cases in which the power has been exercised indicates that the power is not as untramelled as it appears to be. In all these cases something transpired between the pronouncement of the order and the perfecting of it which showed that there was some error in the order pronounced.

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(c) the following passage from the case of *Re Harrison's Share Under A Settlement Harrison v Harrison and Others; Re Ropner's Settlement Trusts Ropner v Ropner and Others* [1955] 1 All ER 185 at p 192 is instructive:

> It is important to remember that; in the ordinary way, the recall of an

unperfected order results in a rehearing at which all parties can present such further arguments as they may be advised having regard to the matter, whatever it may be, which is sought to cast doubt on the correctness of the order as orally pronounced.

(d) in *Re XL Petroleum Pty Ltd* [1971] VR 560, the court held that having regard to the extensive rights of appeal now conferred on parties, *the power to recall an order* which has not been passed and entered *is one which should be sparingly exercised, particularly, if the judgment of the court was appropriate having regard to the facts established before it and in accordance with the relevant law*;

(e) in *Tomlinson v Commissioner of Taxation* (1977) 7 ATR 630, it was held that the power of court to review an order which has not been perfected can only be exercised judicially and on sufficient ground; and

(f) finally, in *Lalchand Nathermal v Kamaluddin bin Maamor* [1991] 1 MLJ 380; [1991] 1 CLJ 42, Abdul Malek Ahmad J stated:

A careful consideration of the cumulative effect of all these would appear to be that once a judgment is pronounced, it cannot be altered except by discretion in specific situations ...

[38] I should add that in *Affin Bank Berhad v WT Low & Ng Realty Sdn Bhd* [2003] MLJU 1 at p 6; [2003] 1 CLJ 674 at p 679 (HC), Abdul Malik Ishak J (as he then was) referred to *Lalchand Nathermal v Kamaluddin bin Maamor* [1991] 1 MLJ 380; [1991] 1 CLJ 42 and went on to explain that:

(b) a distinction must be made between changing a judgment as in this case and amending an order just to give the real effect of a judgment which had been announced.

[39] Thus, the principle that may be culled from the cases referred to above is that a decision may be altered or amended or varied in order to rectify a mistake or to clarify and remove any ambiguity or especially to ensure that the order truly reflects the intention of the decision maker. But the use of such power to bring about 'a complete change' or 'complete reversal' of a judgment or order which has been declared to the parties, in the absence of any material change in the evidential or other circumstances, is in my view, controversial.

[40] It is now appropriate to examine the grounds of judgment that were provided by the SCJ specifically to the part where he alluded to the 'recall' of the 'decision'. He said:

Pada 30 November 2016 mahkamah dengan kehadiran semua pihak-pihak telah memberikan keputusan setelah bicara penuh. Mahkamah telah membuat keputusan secara bertulis sebagaimana minit bertulisan tangan di dalam fail fizikal (iaitu defendan bertanggungan 100%).

Namun semasa membacakan keputusan kes tersebut mahkamah ini telah terkhilaf dalam membacakan keputusan dalam kes ini iaitu plaintif bertanggungan 100% iaitu yang bermaksud kes plaintiff ditolak.

Namun demikian setelah menyemak kembali fail kes ini pada hari yang sama mahkamah ini mendapati ianya telah terkhilaf dalam membacakan keputusan tersebut.

Oleh yang demikian, Mahkamah telah mengarahkan kepada jurubahasa mahkamah agar menghubungi pihak-pihak secara lisan atas dasar 'urgency of the matter' supaya hadir di hadapan mahkamah ini pada keesokannya jam 9 pagi.

Pada 1 Disember 2016 jam 9 pagi kedua-dua peguam plaintif dan defendan telah hadir di hadapan mahkamah ini dan mahkamah ini secara lisan dengan kehadiran pihak-pihak telah memaklumkan berkenaan kekhilafan ini. Mahkamah ini juga telah memaklumkan bahawa satu permohonan untuk semakan ke mahkamah tinggi telah dibuat pada hari yang sama menurut di bawah Rules of Court 2012.

Semakan tersebut telah didaftar di bawah No kes WA-13NCVC-1 tahun 2016 di Mahkamah Tinggi, namun demikian Yang Arif Hakim Mahkamah Tinggi memutuskan bahawa perkara ini hendaklah diputuskan melalui rayuan dan bukannya melalui ss 32 atau 33 Akta Mahkamah Kehakiman.

Defendan-defendan kemudiannya telah memfailkan satu rayuan terhadap keseluruhan keputusan tersebut.

[41] What is significant about the grounds of judgment is that the SCJ has given the impression that he had actually decided to allow the plaintiffs' claim and had merely 'misread' the decision on 30 November 2016. But the SCJ's explanation does not sit well with the narrative of the events that transpired on 30 November 2016 and 1 December 2016 which are stated in Ratnavathy's affidavit. It may be recalled that on 30 November 2016, counsel for the defendants had actually sought clarification and asked the SCJ to confirm whether he was dismissing the plaintiffs' claim. According to Ratnavathy's affidavit, the SCJ confirmed that liability was 100% against the deceased. These are clearly stated in paras 5, 6 and 7 of Ratnavathy's affidavit and they read as:

5. Selanjutnya, selepas pihak-pihak yang dimaksudkan di atas telah mengambil tempat dalam Kamar, Tuan Hakim Nu'aman B Mahmud Zuhudi, *Tuan Hakim mula membaca keputusannya dengan menyatakan 'pihak plaintif bertanggung 100% liabiliti* dan selanjutnya membaca awad-awad untuk kuantum.

6. Semasa Tuan Hakim membaca butiran awad bagi kuantum, *saya memohon klarifikasi dan tanya Tuan (Adakah kes plaintif ditolak dengan kos) dan Tuan Hakim mengulangi sekali lagi plaintif bertanggung 100% liabiliti.*

7. Selanjutnya, Tuan Hakim telah menyatakan tentang awad kos dan sekali lagi *saya telah memohon klarifikasi bahawa kos adalah kepada defendan dan Tuan Hakim telah mengangguk kepala dan menyatakan ya*.

[42] It is significant that on the next day, 1 December 2016, the SCJ told parties that he was referring the file to the High Court under civil revision and 'maintaining' his decision to dismiss the plaintiffs' claim. It is therefore rather surprising that it is stated in the grounds of judgment dated 21 April 2017 that this was a case where the SCJ had merely 'misread' his decision. In the grounds of judgment, the SCJ makes no mention of the fact that he was 'maintaining' his earlier decision to dismiss the plaintiffs' claim. It is also very telling that none of the events that actually transpired in chambers were captured in the grounds of judgment. At any rate, since grounds of judgment have been furnished and the SCJ has endeavoured to explain the reasons for allowing the plaintiffs' claim, counsel for the defendants urged upon this court to treat this appeal as a rehearing and relook at the explanation and justification that are found in the grounds of judgment and to decide whether or not, on the evidence, appellate interference is warranted. I should emphasise once again that counsel for the plaintiffs did not seek to condone the manner in which the matter was handled by the SCJ on 30 November 2016 and 1 December 2016 and in fact preferred that the matter be remitted to the sessions court for a retrial before another judge. Counsel for the plaintiffs said that in view of the events that transpired in the sessions court, the case should, as a matter of fairness and justice to all parties, be sent back to the sessions court for a retrial before another judge.

[43] However, counsel for the defendants took a different view. He did not agree to the suggestion for retrial and argued instead that it would be akin to giving the plaintiffs a second bite at the proverbial cherry. It was also argued for the defendants that as a matter of fairness and justice, the case should not be sent back to the sessions court for a restrial as all the evidence that could be tendered on behalf of the plaintiffs was duly tendered and that there was nothing more that could be adduced on behalf of the plaintiffs which would or could improve their position. Counsel for the defendants argued that this court was in as good a position to deal with the issues and to decide accordingly.

[44] I turn now to invitation by counsel for the defendants for a review of the evidence and the merits of the appeal vis a vis the fatal accident claim. Learned senior counsel for the defendants said that looking at the evidence as a whole, including the fact that the said motorcar was severely damaged and there was alcohol in the deceased's blood and urine, the only inference which could be drawn is that the deceased was speeding at the material time and could not control the said motorcar and that he was ultimately the author of his own misfortune. He said that the defendants were not to be blamed for this unfortunate accident.

[45] On the other hand, counsel for the plaintiffs said that on the evidence that was adduced, the decision to allow the plaintiffs' claim was a fair and

reasonable one, particularly since the defendants took the risk of submitting no case to answer in circumstances where the onus of proof had shifted to the defendants.

[46] I return now to the issue of 'recall' of the judgment/order made on 30 November 2016 and the subsequent about-turn that was made by the SCJ on 1 December 2016. Quite clearly, until the order is perfected, the court retains a discretion pursuant to its inherent jurisdiction to recall and alter or amend the order, but this will depend on the circumstances and also the manner in which the process of recall is done. The power to recall and alter the decision is one which must be used sparingly, judicially and on sufficient grounds. The proposition that a court retains power to recall and amend an order that has already been made is not totally heretical and in recent times the Court of Appeal has reiterated the principle in *Dr Bernadine Malini Martin v MPH Magazine Sdn Bhd & Ors and another appeal* [2010] 5 MLJ 755 (CA) where the Court of Appeal opined that:

> [26] Our decision on the appeal in respect of the order on costs are as follows: We agree that the general principle envisaged by the rules is for costs to follow the event; that the successful party is entitled to be paid his costs except when it appears to the court that, in the circumstances of the case, some other orders should be made. *We accept the proposition that an order can be reviewed on the judge's own motion or on the application of a party until such time as the order has been perfected.*
>
> The judge retains control over the case until the order giving effect to his judgment is formally completed (see *Chee Kuan Cheng v Chuo Kong Kah* [1967] 2 MLJ 74 at p 75 (FC); *Seong Fatt Sawmills Sdn Bhd v Dunlop Malaysia Industries Sdn Bhd* [1984] 1 MLJ 286 at p 292).

[47] The issue here is whether there was substantive and procedural fairness in recalling and reversing the earlier decision by the SCJ. The starting points are the facts and the evidence adduced during the trial and the SCJ's appreciation (or the lack of it) and his contemporaneous response to the evidence adduced during the trial. It is not without significance that at some point during the trial when PW1 was testifying the SCJ did implicitly give the impression that he was minded to dismiss the plaintiffs' claim. This may be gleaned from his utterance during the trial where he said:

> Saya rasa selepas mendengar IO, saya boleh membuat keputusan. Make it short. I give you another 3 minutes.

[48] To my mind, the utterance by the SCJ during the trial is likely to have lulled the defendants into a false sense of security or assurance that the plaintiffs' case was doomed to fail. Needless to say, this is exactly the sort of situation which exemplifies the virtue, wisdom and the need for a measure of judicial silence on the part of the trial judges so that parties are not given the

wrong impression and not misled into taking positions because of the judges' utterances which the parties may later regret.

[49] As I said, the SCJ's mistake is first, in changing his mind and secondly the manner of handling the situation when presented with the problem. An example of how a predicament of this nature is to be handled can be gleaned from the judgment of Kulasekaram J in *Lim Yam Teck v Lim Swee Chiang & Anor* [1979] 1 MLJ 162 (HC) where the trial judge candidly accepted that he may have made a mistake in initially dismissing the plaintiff's claim. I must place a caveat that I am not totally convinced that it was appropriate or lawful for the trial judge in that case, to reverse himself the way he did. But he did mitigate the situation in that he called the parties back and declared that he was continuing with the trial and sought further clarification from counsel on the points of evidence that were troubling him. Looking at the way the SCJ handled the matter in the present case, the only conclusion to be made is that there was a serious misdirection as he failed to inform the parties about the points in the evidence that were troubling him (if at all that was the case) and to ask for clarification or further submissions or evidence, if that was necessary. It may be recalled that the defendants had submitted no case to answer. It is doubtful that they were put to an 'election'. If they were not put to an election then if the SCJ was of the view that the plaintiffs had established a prima facie or any sort of case, then the SCJ ought to have given the defendants the option of calling evidence, in which case further trial dates should have been fixed. But that was not done. He merely said that he 'misread' his decision.

[50] The grounds which came out on 21 April 2017 describes the event that took place on 30 November 2016 as a mere misreading of the SCJ's decision. But the factual narrative of events which has been confirmed by the plaintiffs' counsel, does not support the suggestion that it was a misreading of the decision by the SCJ. This is because the SCJ had confirmed more than once that his decision was to dismiss the plaintiffs' claim and on 1 December 2016 he said that he was sending the file to the High Court as a civil revision and would be 'maintaining' his earlier decision to dismiss the claim. Thus, the SCJ's so called explanation in the grounds of judgment for the reversal of the decision is plainly untenable and is at odds with the events that actually transpired on 30 November 2016 and 1 December 2016. Also, it is troubling that the court minutes do not reflect the events that actually transpired on 30 November 2016 and 1 December 2016. In this case, the grounds of judgment were belatedly furnished by the sessions court and the question now is whether based on the grounds of judgment, the decision of the SCJ in allowing the plaintiffs' claim can be upheld. This therefore takes me to the question of liability for the fatal accident. In this regard, the SCJ made the following findings. He said:

ISU LIABILITI

Bagi penentuan liabiliti Plaintif telah memanggil seorang saksi iaitu Insp Fuzie bin Samat (SP1) iaitu pegawai penyiasat bagi kes ini. Defendan dalam kes ini tidak dipanggil di Mahkamah bagi memberi keterangan bila peguam Defendan memilih untuk membela diri dengan 'no case to answer'.

Keterangan Pegawai Penyiasat (SP1)

Pegawai penyiasat dalam keterangan mengatakan berdasarkan siasatan, beliau telah memberi keterangan bahawa kemalangan berlaku apabila simati telah melanggar motosikal defendan pertama WVC 1757 yang diletakkan di belakang motolori defendan kedua WLK 4155 yang berada dalam keadaan statik untuk membuat kerja penyelenggaraan lampu di tempat kemalangan tersebut.

SP1 telah mengemukakan rajah kasar dan telah ditandakan sebagai P1. Beliau mengesahkan arah perjalanan simati dan juga bahawa perlanggaran berlaku di lorong kanan. Gambar tempat kemalangan juga telah ditandakan sebagai P2. Semasa pemeriksaan balas salinan laporan Puspakom ditandakan sebagai P4, ujian Toksilogi sebagai P5 dan laporan post-mortem simati sebagai P6.

Setelah mendengar keterangan, satu-satunya saksi untuk liabiliti Mahkamah membuat dapatan fakta berikut:

1. Tidak dipertikaikan kemalangan berlaku di lorong kanan sebagaimana rajah kasar P1.
2. Pegawai penyiasat tidak berada di tempat kejadian semasa kemalangan berlaku. Semasa SP1 tiba di kawasan kemalangan beliau hanya melihat kon yang telah pecah.
3. Tiada keterangan menunjukkan bahawa semasa kejadian kemalangan berlaku adanya langkah keselamatan seperti kon, reflector light dan baton light dipasang atau terdapat sebarang langkah keselamatan dibuat.
4. Tiada sebarang keterangan menunjukkan simati hilang kawalan.
5. Tidak dipertikaikan bahawa kandungan dalam darah dan air kencing simati menunjukkan kandungan alkohol sebanyak 50mg per 100ml dan 80mg per 100ml.
6. Tidak dipertikaikan bahawa kandungan alkohol simati adalah di bawah kadar alkohol yang dibenarkan di bawah Akta Pengangkutan Jalan 1987.
7. Tiada sebarang keterangan yang membuktikan bahawa simati mabuk semasa kemalangan. Laporan tosikologi tidak membuktikan langsung samada simati mabuk atau tidak.

Mahkamah setelah meneliti keterangan SP1 berpendapat atas imbangan kebarangkalian plaintif telah berjaya membuktikan kes mereka dan beban pembuktian berpindah terhadap defendan bagi membuktikan bahawa tiada sebarang kecuaian di pihak defendan.

Namun defendan memilih no case to answer. Mahkamah telah meneliti nas undang-undang berkenaan keadaan di mana defendan memilih untuk berdiam diri 'no case to answer'.

...

Disebabkan defendan memilih untuk tidak memberi keterangan maka mahkamah tiada pilihan lain selain menerima keterangan plaintif. Defendan gagal menjelaskan samasa terdapat langkah keselamatan yang keterangan sewajarnya telah diambil.

Dalam membuat keputusan ini walaupun mahkamah hanya berpandukan keterangan pegawai penyiasat sahaja, mahkamah telah membuat penelitian fakta secara berhati-hati.

Berdasarkan otoriti yang ditunjuk dan dapatan fakta, mahkamah ini seterusnya memutuskan atas imbangan kebarangkalian bahawa kemalangan ini adalah diakibatkan oleh kecuaian defendan dimana defendan gagal untuk mematahkan kes plaintif. Oleh yang demikian, defendan 100% dipersalahkan kerana menyebabkan kemalangan ini dan tiada sumbang cuai di pihak plaintif.

[51] From the notes of evidence, PW1's evidence was that the deceased was to blame for the accident. According to PW1's investigations, the defendants were lawfully carrying out repair work on the lamp posts along the road and there were safety cones and blinker lights to warn road users of the work that was being done.

[52] The SCJ appears not to have given any consideration to the fact that the said motorcar had crashed into the motorcycle and motor lorry which shows that the deceased was speeding and did not keep a look out for the work that was being undertaken on the road. Admittedly, only one side of the road (point A3 to A4) was blocked and the deceased could have easily driven through the other side (point A1 to A2 or A2 to A3) had he been alert to what was happening on the side of the road that was blocked. From the evidence, particularly the extent of damage to the said motorcar that was driven by the deceased, it is apparent that the deceased was speeding and the said motorcar was travelling along the fast lane (point A3 to A4 in the sketch plan at p 297 AR). Arguably, if the deceased was driving at a speed which allowed him sufficient control over the said motorcar then the deceased would not have failed to notice that the fast-lane was blocked and he should have been able to veer to the left and go through the other two lanes namely point A1 to A2 or A2 to A3 of the sketch plan. In this regard, it is imperative to note that the photographs of the motorcar (pp 299–300 AR) and the motor-vehicle inspection report by PUSPAKOM Sdn Bhd pursuant to s 117(5) of the Road Transport Act 1987 (p 310 AR) showed very clearly that there was severe damage to the said motorcar. In particular, the front of the said motorcar was quite literally smashed.

[53] Hence, counsel for the defendants submitted (quite rightly) that as a matter of common sense, the inference to be drawn is that the said motorcar had been speeding and crashed into the stationary vehicles. This therefore raises the question as to whether the deceased was keeping a proper look-out

and finally, losing control over the said motorcar when he realised that the fast lane was blocked. The fact that there was alcohol in the blood and urine of the deceased indicates that there was some level of intoxication and this may have played a role in the ability (or inability) of the deceased to drive carefully along the road and to have proper control of the said motorcar (see decision of Ong J in *Kho Teng Hooi v The Bristish India General Insurance Co Ltd* [1958] 1 MLRH 396 where the learned judge discussed the topic of presence of alcohol in the blood and urine and the state of 'insobriety' which it gives rise to).

[54] Thus, as a starting point, it is tempting to accede to the invitation by counsel for the defendants and to conclude that no liability should be attributed to the first defendant who was a passive bystander who was lawfully carrying out repair work on the street lamp along the road and to rule that the claim ought to have been dismissed, which was the learned sessions judge's original decision on 30 November 2016 and which rather curiously, was reversed the next day for reasons which do not stand up to curial scrutiny.

[55] The misdirection or misappreciation by the SCJ stems from the following circumstances. In the present case the SCJ had, during the course of the trial, given a hint that he was minded to dismiss the plaintiffs' claim whereas he ultimately allowed the claim. In his grounds of judgment the SCJ appears not to have considered the fact that the said motorcar was very severely damaged, which showed that the deceased was speeding at the material time. However, the SCJ brushed off the presence of alcohol in the deceased's blood and urine as being inconclusive and not determinative of the deceased's intoxication. I have given considerable thought as to whether in light of the circumstances, which are not due to the fault of the parties but rather it being an obvious case of mishandling by the SCJ, the case should be remitted to the sessions court for retrial. In so far as the handling of the trial is concerned, I think that the judicial utterance by the SCJ (p 51 AR) was unwarranted and injudicious. It obviously played on the minds of counsel for the defendants and influenced their decision to submit no case to answer. Next is of course the delivery of the decision itself on 30 November 2016 and the 'reversal' on 1 December 2016.

[56] In resisting a retrial, counsel for the defendants said that whatever evidence that could be tendered has been tendered and it is only a matter of evaluation and assessment and appraisal of the evidence and for the appropriate deductions and inferences to be made from the evidence.

[57] Thus, although counsel's suggestion that there should be no retrial is an attractive one, I cannot overlook the fact that the defendants' strategy of submitting no case to answer is a risky one, particularly in a fatal accident claim. So long as there is some prima facie evidence to support the plaintiffs'

evidence to support the claim, the submission of no case to answer would leave the assertion of the plaintiffs' unanswered; with the result that judgment will be entered in favour of the plaintiffs. In this regard it is apposite to quote from the case of *Bansal Hermant Govindprasad and Another v Central Bank of India* [2003] 2 SLR 33 (Court of Appeal — Singapore) at para [10] which reads as:

> [10] The trial judge, having noted the views of the authors Aronson M & Hunter J, in *Litigation: Evidence and Procedure* (6th Ed, 1998) at p 732, stated (at para 21 of his grounds of judgment) that:
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> > A decision by a defendant not to adduce evidence in his defence is a decision that ought not to be lightly taken. Where a defendant makes such an election, the result will be that the court is left with only the plaintiff's version of the story. So long as there is some prima facie evidence that supports the essential limbs of the plaintiff's claim(s), then the failure by the defendant to adduce evidence on his own behalf would be fatal to the defendant.

[58] Of course, on one analysis, it is correct to say that the accident occurred because the motorcar driven by the deceased had crashed into the defendants' motorcycle before colliding into the motor lorry which was also parked on the extreme right lane of the road (fast lane) (point A3 to A4 in the sketch plan). The imperative question therefore is whether the deceased had a right to use the fast lane and whether the defendants were entitled to obstruct the fast lane with motorcycle No WVC 1757 for purpose of carrying out repair work to the street lamps along the road. As stated earlier, the defendants had not pleaded that motorcycle No WVC 1757 was lawfully parked stationary on the fast lane of the road pursuant to a contract or directive of the local authority, Datuk Bandar Kuala Lumpur ('DBKL'), which has jurisdiction over the road and the street lamps.

[59] But evidence was nevertheless led through PW1, (apparently without any objection) that the defendants were lawfully carrying out repair work at the material time. Also it was not pleaded in the defence that safety cones and/or blinker lights had been placed at the site of the accident such that road users were warned of the obstruction ahead.

[60] The ultimate question before me is whether in view of what had transpired in the court below and based on the matters pleaded (and which ought to have been pleaded) the appeal should be allowed and the plaintiffs' claim dismissed or whether despite the stand taken by the defendants of 'no case to answer', the appeal should be allowed and the decision/judgment dated 30 November 2016 set aside and the case remitted to the sessions court for retrial before another judge on a fast track basis. Before I venture to make my conclusion, I make the following observations on the implications of submitting no case to answer.

SUBMITTING NO CASE TO ANSWER

[61] In law, there are two different circumstances where a defendant could submit that there was no case to answer and the consequence might not be the same for both circumstances should the submission fail. First, a no case submission could be made on the basis that, accepting the plaintiff's evidence at its face value, no case has been established in law. Second, the submission could be made on the basis that the evidence led for the plaintiff was unsatisfactory, or unreliable, that the court should find that the burden of proof had not been discharged (see *Storey v Storey* [1960] 3 All ER 279).

[62] In this regard, I have examined the decision of the Singapore Court of Appeal in *Bansal Hermant Govindprasad and Another v Central Bank of India* [2003] 2 SLR 33 paras [10]–[15] and find that these passages fortify my view that in an appropriate case, despite the fact that the defendant had opted to submit no case to answer, the court could (on appeal) send the case back for retrial in order to achieve a just result. It must be emphasised that in the appeal before me there is nothing in the notes of proceedings to indicate that the defendants were put to an election that they would not be calling any evidence.

[63] In *Jaafar bin Shaari & Anor (suing as Administrators of the Estate of Shofiah bte Ahmad, deceased) v Tan Lip Eng & Anor* [1997] 3 MLJ 693 at p 712; [1997] 4 CLJ 509 at p 528 (SC) Gopal Sri Ram JCA (as he then was) said that the requirement to put counsel to his election, namely that if he did not call evidence, he would stand or fall on his submissions, was not a 'mere formality but one of essential justice' (see paras F–H (MLJ); (d)–(e) (CLJ) of the judgment).

RETRIAL

[64] I will now deal with the issue of re-trial. The topic of re-trial was examined in the following cases. The first case is *Gulwant Singh v Abdul Khalik* [1963] 1 MLJ 93 (CA) where Barakbah JA said:

> In the case of *Vowles v Armstrong-Siddeley Motors Ltd* [1938] 4 All ER 796 at p 802 MacKinnon LJ states:
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> > I confess I see no escape from the conclusion that the findings in favour of the plaintiff and those in favour of the defendant are mutually destructive. That being so, I do not think we can affirm the judgment for the defendants and equally we cannot accede to Mr Doyle's appeal to us to enter judgment for the plaintiff. I think there must be an order for a new trial.
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> In view of the contradictory statements in the judgment of the learned trial Judge and on the authority of the above-mentioned case in my opinion there is no alternative but to allow the appeal and to send the case back for re-trial. costs to abide the result of the retrial. I therefore make the order accordingly.

[65] The next case is *Chia Bak Eng & Anor v Ponggol Bus Service Co* [1966] 2 MLJ 224; [1965–1968] SLR 168 (FC) Singapore per Chua J at pp 225–226 (MLJ):

> The appellants have satisfied me that this appeal should be allowed as, in my view, the learned trial judge erred in rejecting the evidence of Lim Ah Huat.
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> Now, the question arises as to what this court should do. Should this court reverse the conclusions of the learned judge and accept the evidence of Lim Ah Huat as true and draw inferences from the facts disclosed in his evidence? The duty of a court hearing an appeal from the decision of a judge was clearly defined by Lord Halsbury in the House of Lords case of *Montgomerie & Co Ltd Wallace-James* [1904] AC 73 at p 75:
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> > Where a question of fact has been decided by a tribunal which has seen and heard the witnesses, the greatest weight ought to be attached to the finding of such a tribunal. It has had the opportunity of observing the demeanour of the witnesses and judging of their veracity and accuracy in a way that no appellate tribunal can have. But where no question arises as to the truthfulness, and where the question is as to the proper in references to be drawn from truthful evidence, then the original tribunal is in no better position to decide than the judges of an Appellate Court.
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> And in another House of Lords case of *Thomas Thomas* [1947] AC 487, Lord Thankerton said at p 487:
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> > I do not find it necessary to review the many decisions of this House, for it seems to me that the principle embodied therein is a simple one, and may be stated thus: I. Where a question of fact has been tried by a judge without a jury, and there is no question of misdirection of himself by the judge, an appellate court which is disposed to come to a different conclusion on the printed evidence, should not do so unless it is satisfied that any advantage enjoyed by the trial judge by reason of having seen and heard the witnesses, could not be sufficient to explain or justify the trial judge's conclusion; II. The appellate court may take the view that, without having seen or heard the witnesses, it is not in a position to come to any satisfactory conclusion on the printed evidence; III. The appellate court either because the reasons given by the trial judge are not satisfactory, or because it unmistakably so appears from the evidence, may be satisfied that he has not taken proper advantage of his having seen and heard the witnesses, and the matter will then become at large for the appellate court, it is obvious that the value and importance of having seen and heard the witnesses will vary according to the class of case and, it may be, the individual case in question.
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> In the present case there is the question of the credibility of the only witness called by the plaintiffs who said he was present when the accident took place and it is not a case where the point in dispute is the proper inferences to be drawn from proved facts. An appellate court in these circumstances is not in a good position to evaluate the evidence of Lim Ah Huat as it is difficult to estimate correctly the credibility of this witness from the printed evidence. In my opinion I should not in this case without the advantage of seeing the witness come to the conclusion that the witness was speaking the truth.

A For these reasons I would order a re-trial in this case.

[66] Lastly, I make reference to the following passages from the case of *Bansal Hermant Govindprasad and Another v Central Bank of India* [2003] 2 SLR 33 where the Singapore Court of Appeal appeared to approve the flexible approach to the need for a retrial despite a submission of no case to answer in the court below. The following paragraphs from the judgment are illuminating on this point:

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> 12 We should point out that *Storey v Storey* was examined by the trial judge, but it was distinguished on the ground that the appellate court was considering the circumstances in which it could nevertheless, in a case whereas submission of no case to answer had not been upheld, direct that a new trial be held. In that case, there was an appeal from an order of the Divisional Court directing that there should be a re-hearing of a summons for maintenance issued by the appellant wife against her husband based on persistent cruelty and desertion. The summons was first heard before justices of the peace, where the husband elected, in submitting that there was no case for him to answer, that he would not call any evidence. The justices accepted the submission and the complaint was dismissed. The wife appealed. Though the Divisional Court thought that the justices were wrong to have accepted the submission of no case to answer, it did not make an order for maintenance in her favour or to have the case remitted to the same justices for further findings of fact. Instead, it ordered a new trial before a fresh panel of justices. Ormerod LJ, delivering the judgment of the court, said (at p 282):
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> > There can, we think, be no doubt that in the former type of submission ,a defendant is bound by his election, and there can be no new trial. This rule, in our opinion, however, does not of necessity apply to the second type of case where the judge is invited to dismiss the case because of the unsatisfactory or unreliable nature of the evidence. In some cases it may well be that the appellate court will be able to decide the case without sending it back, but in others, and this in our judgment is certainly one, justice could not be done without are-hearing. In our opinion, if the submission of no case is based on the unsatisfactory or unreliable nature of the evidence led by the plaintiff, and the appellate court finds itself unable on the findings of the court below to come to a just conclusion, the only course to be adopted in the interests of justice is to order a new trial, even if the defendant has elected to stand on his submission.
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> 13 ... It seemed to us clear that the English Court of Appeal there agreed that there should be a new trial, notwithstanding the election by the husband because, and this seemed to be an important consideration, the case raised a question of status and thereby some public interest was involved. Ormerod LJ said (on the same page):
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> > ... it is better in matrimonial disputes for the justices to hear both sides before coming to a decision, particularly as a finding by them of desertion or persistent cruelty may form the basis for a subsequent petition for divorce.
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> 14 ... The trial judge was clearly conscious of the second circumstance under which a submission of no case to answer could be made. He did not rule out that a submission of no case could also be made on that basis, as can be seen from his

observation (para 25 of his Grounds of Judgment):

> It may be that the view taken by Aronson and Hunter was too restrictive and that a submission of no case to meet may also be upheld where the evidence adduced by the plaintiff is so unsatisfactory or unreliable that the court is able to find that the burden of proof on the plaintiff has not been discharged. But that said, I nevertheless consider the summary by Aronson and Hunter a helpful one.

15 ... The summary of Aronson & Hunter that the judge referred to was the passage found at p 732 of the book:

> However, if the defence leads no evidence where there is a case to answer, its silence could (depending on the facts) be taken to strengthen the opposing case. In particular, circumstantial evidence which could cut both ways might well look stronger if the defendant or accused is in a position to dispel the doubt, but refuses to go into evidence: *May v O'Sullivan* (1955) 92 CLR 654 and *Weissensteiner v R* (1993) 178 CLR 217.

16 ... In electing not to adduce any evidence, the submission of the Bansals was that, even accepting the plaintiff's evidence on the face of it, no case had been made out against them. The submission made was not on the basis that the evidence led for the CBI was unsatisfactory or unreliable. This was a submission of no case to answer of the first type enumerated in *Storey v Storey*. Therefore, the trial judge did not apply any wrong test or principle.

[67] Thus, in the present case, it is my view that having regard to all the circumstances of this case and in the interest of fairness and justice, I should order a new trial. I have predicated my decision to order a new trial, inter alia, on the basis of the following factors:

(a) there was a concession by counsel for the plaintiffs that this appeal concerns an 'unsafe judgment' and that there should, as a matter of fairness to both sides, be a new trial;

(b) the overall circumstances of the case, including the failure by the SCJ to carefully consider the evidence of PW1 on material respects, particularly PW1's conclusion that the deceased was to be blamed for the accident and the presence of alcohol in the blood and urine of the deceased and the photographs (PUSPAKOM report) showing extensive damage to the said motorcar which raises clear inference that the said motorcar was speeding before the accident;

(c) the lack of clarity from the notes of evidence as to the type of no case to answer that was made and whether the defendants counsel was put to an 'election' that they would not be calling evidence and would stand or fall by the submissions; and

(d) finally, the absence in the defence of any averment or particulars justifying the obstruction on the road and thereby negating negligence or nuisance.

[68] As such, taking all of the above matters into consideration, I was impelled to the view that the most just and appropriate order is that the judgment dated 30 November 2016 should be set aside and there should be a retrial. Of course, a retrial would mean that both sides would have a second bite at the proverbial cherry. But it is fair and just that the 'unsafe' judgment dated 30 November 2016 be set aside and for parties to restart the process of trial and call the same or such other witnesses as they desire in support of their case or defence as the case may be. In the retrial, the defendants will be at liberty to look at the matter afresh and take a new strategy and call witnesses, if they so desire. As to whether the defence should be amended is something for the defendants to consider and to be pursued by way of an application in the appropriate manner before the new sessions court judge who will hear the case.

[69] In reaching my decision, I have drawn guidance from the words of the Court of Appeal in *Perembun (M) Sdn Bhd v Conlay Construction Sdn Bhd* [2012] 4 MLJ 149 at p 153 where Abdul Wahab Patail JCA said:

> [4] Both parties began their submissions with the clear understanding that an appellate will be slow to interfere with the findings of facts and judicial appreciation of the facts by the trial judge. They cited this court in *Sivalingam a/l Periasamy v Periasamy & Anor* [1995] 3 MLJ 395; [1996] 4 CLJ 545 (CA). This general principle was adopted by this court in *Lee Ing Chin @ Lee Teck Seng & Ors v Gan Yook Chin & Anor* [2003] 2 MLJ 97; [2003] 2 CLJ 19 (CA) and other cases.
>
> It is clear it is a general principle and that there are exceptions when appellate intervention is necessary to ensure justice is done. In the cases regularly cited, the terms 'intervene' and 'interfere' are used interchangeably. A more precise use of terminology would remove much unnecessary confusion and argument. It is more precise to say that an appellate court will intervene to correct an injustice when it is shown to have occurred in the trial court, but it would be an interference otherwise.

[70] *Order:* The judgment/order dated 30 November 2016 is set aside. The case is remitted to the sessions court for retrial before another judge. I hereby direct that the matter be called up for mention in the sessions court on Friday 12 May 2017 for trial dates to be fixed. I ordered that an early trial be fixed for this matter. I am fixing costs of this appeal at RM5,000 (subject to 4% allocatur) and is to be 'costs of the cause of the retrial'. The deposit is refunded to the defendants.

Order accordingly.

Judgment dated 30 November 2016 set aside; case remitted to sessions court for retrial before another judge with costs of RM5,000 subject to 4% allocator.

Reported by Dzulqarnain Ab Fatar